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IN THE

Supreme Court of the United States

October Term, 1948.

No. 140.

Federal Broadcasting System, Inc.

v.

American Broadcasting Co., Inc. and
Mutual Broadcasting System

REPLY MEMORANDUM OF RESPONDENT AMERICAN BROADCASTING COMPANY, INC., TO AMICUS CURIAE MEMORANDUM FOR THE UNITED STATES.

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American Broadcasting
Company, Inc.

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Press of Byron S. Adams, Washington, D. C.

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CASES CITED.

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FEDERAL BROADCASTING SYSTEM, INC.

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REPLY MEMORANDUM OF RESPONDENT AMERICAN BROADCASTING COMPANY, INC., TO AMICUS CURIAE MEMORANDUM FOR THE UNITED STATES.

The Memorandum for the United States, in support of the petition for certiorari, proceeds on the same misconception relied upon by Petitioner. It, too, mistakenly assumes that the Court of Appeals decided the legality of network affiliation agreements used in the broadcasting industry and the merits of Petitioner's allegations of conspiracy by the four network defendants to violate the anti-trust laws. In fact, the court below determined only that the District Court had not abused its discretion in denying the request for preliminary injunction against two of the defendants, the Respondents herein, particularly when the record indicated that each had acted independently and pursuant to express provisions of its own written agree-

ment with Petitioner. Petitioner's right to prove on trial the alleged violations of the antitrust laws is in no way prejudged or prejudiced by the District Court's denial of the preliminary injunction or the Circuit Court's opinion affirming the same. Petitioner was thereby simply put to the necessity of establishing its case by probative evidence. It lost at most the possibiliy of avoiding that burden by means of a preliminary injunction which it perhaps hoped would induce, if not compel, these Respondents to accede to its demands without waiting for determination of the issues after trial.

The memorandum for the United States ascribes to the lower court a ruling that ordinary network affiliation contracts[1] could not be deemed violative of the antitrust laws because the Federal Communications Commission, in its Chain Broadcasting Report, had adjudicated that question and approved such contracts. That the lower court made no such ruling is apparent from a reading of the entire paragraph which the memorandum of the United States quotes only in part. Taken out of context, such partial quotation is misleading. This is what was said (R. 170):

> "*We think it improper to grant a preliminary injunction* upon the charge that the networks have unlawful 'exclusive' contracts with their stations where the Federal Communications Commission, after protracted hearings, and consideration not only of the general public interest but of the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of the affiliation contracts at present in use and *the defendants have given reasonable grounds for denying exclusiveness or illegality.* See F.C.C. Report on Chain Broadcasting, Comm. Order No. 37, Docket No. 5061 May 1941, p. 46; National Broadcasting Co. v. United States, 319 U.S. 190, 223, 63 S. Ct. 997, 87 L. Ed. 1344." (Emphasis supplied.)

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[1] As the record shows, Petitioner in the past obtained network programs from both Respondents on preferential terms, which it exacted by means of its monopolistic position in the Rochester market. R. 67-68, 71-73, 82-84, 115.

The full passage in nowise permits any claim that the lower court either disregarded the plain declaration of Section 313 of the Communications Act of 1934 that the antitrust laws are "applicable to . . . radio communications" (48 Stat. 1087, 47 U.S.C. § 313) or misread the opinion of this Court in *National Broadcasting Company* v. *United States*, 319 U. S. 190, 223, 63 S. Ct. 987, 1012, to mean that the F. C. C. had jurisdiction to exempt the practices of radio networks from the application of the antitrust laws. Rather, the opinion below on its face simply reflects the application of the traditional test of the propriety of interim relief—whether the proponent has made a sufficient preliminary showing that the relevant facts and material principles of law were such that he would ultimately prevail. The ruling was simply that preliminary relief could not properly be granted because there was no persuasive evidence of any conspiracy, or as to whether the assailed contracts were in fact exclusive or that they were to be condemned under antitrust law.

The reason for the insufficiency of the record with respect to the asserted exclusiveness of the affiliation contracts is doubtless the limited focus of the prayer for preliminary relief, which rests solely upon an asserted conspiracy between the two respondent networks to boycott Petitioner's station (R. 22). It followed that the affidavits which comprise the record concentrated primarily upon that issue.

Moreover, whether contracts which are in fact "exclusive" violate the antitrust laws can only be determined upon analysis of all of the relevant circumstances. *United States* v. *Columbia Steel Company*, U. S. , 68 S. Ct. 1107, 1121-1123. Since only two of the four national networks are parties in this interlocutory proceeding, the requisite basis for such a determination, even tentatively, is lacking.

In the present posture of the case it is premature to raise issues as to the allegedly monopolistic features of the "pattern of conduct pursued by the four national net-

works". (Memorandum for United States, p. 5). This would extend the case far beyond the conspiracy confines in which Petitioner chose to focus its prayer for interlocutory relief. Questions of such magnitude cannot appropriately be decided upon a record comprised solely of conflicting affidavits and in the absence of the two other networks.

A false note is injected by the denial that networks have "an inherent right to fix the rates at which independent stations may offer their facilities to the advertiser". (*Ibid.*) The Court made no such finding as a reading of its opinion will disclose. No one challenges the right of a station licensee to set its own price for time over its facilities to anyone—network, national advertiser, local advertiser or anybody else. What the lower court denied, and properly so, was that a station owner had a right to compel acceptance of his price by any buyer, including the networks, which are by no means the only outlets for the sale of radio time.

The issues raised in the Memorandum of the United States should be reserved for consideration until the formulation of a complete and reliable record by a full trial, with all four defendant networks participating.

Respectfully submitted,

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